

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

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**LOCAL 147 LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA (NORTHEAST REMSCO  
CONSTRUCTION, INC.),**

**Respondent,**

**And**

**RICHARD BACQUIE, an Individual,**

**Charging Party.**  
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**Case No. 02-CB-231600**

**OPPOSITION TO  
EXCEPTIONS FILED BY  
RESPONDENT RICHARD  
BACQUIE**

**OPPOSITION TO EXCEPTIONS OF RICHARD BACQUIE  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE  
AND BRIEF ON BEHALF OF LABORERS' INTERNATIONAL  
UNION OF NORTH AMERICA, LOCAL 147**

Laborers' International Union of North America, Local 147 ("Local 147" or "Union"), by its attorneys, Manning & Russo, LLC and Raab, Sturm & Ganchrow, LLP, respectfully submit this brief in opposition to the Exceptions ("Exceptions") to the Decision of Administrative Law Judge, Lauren Esposito dated March 25, 2020 ("Decision") and Brief in Support of the Exceptions filed by the Charging Party, Richard Bacquie ("Bacquie" or "Charging Party").<sup>1</sup>

**STATEMENT OF THE CASE**

On November 23, 2018, Richard Bacquie ("Bacquie"), an individual, filed a charge in Case No. 02-CB-231600 against Laborers' International Union, Local 147

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<sup>1</sup> The General Counsel for Region 2 of the NLRB did not file exceptions to the Decision.

("Local 147" or "Union"), alleging that Local 147 violated Section 8(b)(1)(A) of the National Labor Relations Act (Act") by allegedly threatening Bacquie with not being referred to work through the Union's hiring hall because he complained to the Union about discrimination and a lack of transparency in their grievance filing procedure. See General Counsel's Exhibit 1, Charge against Labor Organization dated November 23, 2018. On March 29, 2019. Bacquie amended the charge to allege that Local 147 violated Section 8(b)(1)(A) of the Act by threatening Richard Bacquie that he would no longer obtain employment through the Union, including by loss of Union membership, because he complained to the Union about discrimination and by threatening to take legal action against members if they recorded the Union meetings. See General Counsel's Exhibit 1, Amended Charge against Labor Organization dated March 29, 2019.

By letter dated May 2, 2019, the Regional Director of the National Labor Relations Board, Region 2, John J. Walsh, Jr., advised Local 147 that the portion of the charge alleging that the Union violated the Act by threatening to take legal action against members if the audio recorded the Union meetings was withdrawn. See Respondent's Exhibit 1.

On May 30, 2019, a Complaint issued. See General Counsel's Exhibit 1, Complaint dated 2019. Respondent filed an Answer denying all material allegations of the Complaint and asserting various affirmative defenses. See General Counsel's Exhibit 1, Answer of Respondent to Complaint dated June 13, 2019. On August 2, 2019 an Amended Complaint issued. See General Counsel's Exhibit 1, Amended Complaint dated August 2, 2019. Again, Respondent denied all material allegations and asserted

various affirmative defenses. See General Counsel's Exhibit 1, Answer to Amended Complaint dated August 15, 2019. On September 4, 2019, Counsel for the General Counsel withdrew the allegations asserted against Joseph Fitzsimmons at ¶ 5(b) of the Amended Complaint. Official Report of Proceedings Before the National Labor Relations Board ("Official Transcript"), Volume 1, Page 17, Lines 9-13. A hearing on the charges was held on the following dates: September 4 -6, 2019, October 10, 2019 and November 1, 2019.

On March 25, 2020, Administrative Law Judge Lauren Esposito issued a thirty-four page decision dismissing the Complaint based upon the credibility of the witnesses for both the Charging Party and the Respondent and a lack of documentary evidence to support the allegations. See Decision at p.33.

### **THE EXCEPTIONS**

Bacque asserts three exceptions to the Decision. They are as follows: (1) denial of right to counsel and/or not being informed that he had the right to obtain counsel; (2) denial of access to provide expert witnesses; and (3) judicial prejudice in making findings as an expert and misrepresentation of the record in the Decision. All three of these exceptions lack merit.

#### **A. Lack of Counsel**

Relying upon Avery v. Alabama, 308 U.S. 444, 446 (1940), Bacque claims that he was prejudiced by not being informed of his Constitutional right to have independent counsel. Avery v. Alabama is clearly inapposite to the present case as it involved a criminal defendant's right to counsel under the Fourteenth Amendment. The present

case is not a criminal proceeding and therefore, there is no Constitutional right to counsel. Moreover, unlike the situation in Avery, Bacquie is the Charging Party and not the party being charged. No relief was sought against him. Furthermore, NLRB Form 4668, which is attached to the Complaint, clearly states, “[p]arties may be represented by an attorney or other representative and present evidence relevant to the issues.” Bacquie received a copy of the Complaint and Form 4668. Indeed, Section 102.14 (b) of the NLRB’s Rules and Regulations requires the Regional Director to serve a copy of the Complaint upon the Charging Party.

Similarly, Section 102.38 “Rights of parties” of the NLRB Rules and Regulations provides in pertinent part that “[a]ny party has the right to appear at the hearing in person, by counsel, or other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the Administrative Law Judge may limit participation of any party as appropriate.” Party is defined as “the Regional Director in whose Region the proceeding is pending and any person’s name or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the Act. . . .” NLRB Rules and Regulations, Section 102.1(h). The NLRB’s Rules and Regulations are publicly available on the NLRB’s website and having availed himself of this forum, Bacquie is charged with knowing its rules and regulations.

To support his frivolous argument that he was denied counsel of his choosing, Bacquie cites an exchange between Counsel for the General Counsel and Judge Esposito at pages 86 and 87 of the Transcript. The exchange actually begins at page

85 of the Transcript and involves the failure of Counsel for the General Counsel, Mr. Shimpi, to turn over materials that were responsive to Respondent's subpoena. Judge Esposito states that Mr. Shimpi was supposed to have provided all materials responsive to the subpoena at the beginning of the hearing when Bacquie attempts to interject. Judge Esposito was merely assuring Bacquie that it was Counsel for the General Counsel's responsibility to turn over all materials responsive to the subpoena. Counsel for the General Counsel responded to the subpoena and Judge Esposito was limiting the participation of the parties as appropriate which is clearly within her purview under Section 102.38 of the Rules and Regulations. Judge Esposito did not "appoint" Counsel for the General Counsel to represent Bacquie. She simply correctly found that having responded to Respondent's subpoena, including making a motion to quash that subpoena, it was the responsibility of Counsel for the General Counsel to assure that all responsive documents were produced.

Bacquie's reliance upon pages 286-287 and page 350 is similarly misplaced.<sup>2</sup> Bacquie asserts that allegations were allowed to come into the record which would have otherwise been disallowed had Bacquie been represented by counsel. Nothing could be further from the truth. Counsel for the Union did not ask Bacquie about his pending civil malpractice case as stated by Bacquie in his brief. In fact, at page 288, Lines 22-24 of the Transcript, Counsel for the Union specifically states that he "is not going there" and Judge Esposito states, "We're not going there."

Moreover, the discussion at page 350 involved the admissibility of a prior conviction from 2002. In rendering her decision, Judge Esposito specifically stated that,

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<sup>2</sup> Bacquie also relies upon Page 273, Lines 11-15 of the Transcript. Those lines deal with the production of the Jencks statement from Bacquie which Respondent is unequivocally entitled to receive.

“It is important to note that in evaluating Bacquie’s credibility as a witness, I have not considered certain evidence which Local 147 argues is relevant for the purposes of impeachment. In particular, Bacquie’s conviction in 2002 for fraud and related activity in connection with an access device has not entered into my analysis. See Tr. 325-326, 328-329, 348-349.” Decision at page 26.

**B. Denial of Access to Expert Witnesses**

Bacquie seems to be contending that Judge Esposito could not hear the alleged threats because she did not have the benefit of an expert witness to testify as to the “state of mind and interpretation of statements from the audio record” or the “emotional state of either party the frame or context of language used within the recording.” Charging Party’s Brief at p. 10. Bacquie is trying end run Judge Esposito’s finding that Bacquie was not a credible witness and the fact that neither the audio recordings nor the transcripts of those recordings prepared by Counsel for the General Counsel, with the assistance of Bacquie, contain the alleged threats. Judge Esposito specifically found that “[e]valuating the critical issues of fact in this case requires an assessment of witness credibility.” Decision at page 22. She further found as follows:

Based upon the entire record and my observations of the witnesses, I simply cannot find that Richard Bacquie was a credible witness overall. The evidence establishes that Bacquie made recordings of two different incidents during which the unlawful threats allegedly occurred, one with a recording device physically on his person. However, despite the raised voices and shouting which characterize both incidents, neither of these recordings contain the statements alleged to be unlawful, nor do the transcripts of the recordings prepared by General Counsel. G.C. Exs. 16(a-b), 17 (a-b). It is true that at some points in the recordings individuals are speaking simultaneously, and it is difficult to clearly discern all of the different statements being made. However, Bacquie’s contradictory and sometimes unsubstantiated testimony regarding the accuracy of the recordings, his own recollection of the incidents, and the discrepancies between them does not inspire confidence in his contention that the

unlawful threats actually occurred. At times, Bacquie's testimony was flatly belied by the recordings themselves. Decision at pages 22-23.

No expert witness could fix the fact that the alleged threats were simply not on the audio recordings or the transcripts as found by Judge Esposito nor could an expert change the fact that Bacquie repeatedly contradicted himself, the transcript and the written documents. The alleged threats simply were not on the recordings and Bacquie's testimony as to the alleged threats and his reasons why they could not be heard were not credible. The Administrative Law Judge's findings as to the credibility of witnesses cannot be overturned by the Board unless the clear preponderance of all relevant evidence establishes that they are incorrect. See Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.3d 362 (3d Cir. 1951).

Bacquie relies upon Judge Esposito statement at page 19 that the alleged threat was not audible; however, he omits the second part of that sentence, "and does not appear in the transcript." Decision at page 19. Bacquie similarly cherry picks Judge Esposito's ruling at page 33 of the Decision. Her statement that she cannot discern exactly who is speaking has to be viewed in its context. She finds that "even if Richard, Jr., made the statement, there is no evidence other than Bacquie's testimony to establish that Richard, Jr. was addressing Bacquie, as opposed to the several members involved in the confrontation. Furthermore, the statement, 'You're done!' is sufficiently vague that it could have referred to ending the altercation itself and maintaining order, which was Richard Jr.'s responsibility as Sergeant-at-Arms." Decision at page 33. Even assuming that an expert would support Bacquie's contention that Richard Jr. was the speaker, the statements allegedly made by him were insufficient to establish that Richard Jr. threatened Bacquie.

### C. Judicial Prejudice

In this exception, Bacquie is again challenging Judge Esposito's determinations as to the credibility of him as a witness. He states that "Your honor weighs the credibility of Charging Party on two small factors one regarding reception of Union Constitution and responding to counsel who was badging [sic] Richard Bacquie [sic] as he testified." Charging Party's Brief at p.8. Judge Esposito devoted five and one-half pages of the Decision to explain the basis of her determination which should not be overruled by the Board unless it is contradicted by the preponderance of the evidence. Decision at pp. 22-27; See also Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.3d 362 (3d Cir. 1951). She specifically stated that her determination was "[b]ased upon the entire record and my observations of the witnesses. . . ." Decision at p. 22. She preceded her discussion of the receipt of the Union's Constitution and By-Laws with the words "For example" and was clearly using that incident to support the fact that Bacquie's testimony was contradicted by the documentary evidence. Decision at p.23.

Furthermore, there was no admission by counsel for the Union that the alleged threats were made. The quote attributed to counsel was counsel paraphrasing the position of the NLRB and cannot be construed as an admission that the alleged threat was made. The statement, when read in context, is self-explanatory. See Tr. 428-429.

### **CONCLUSION**

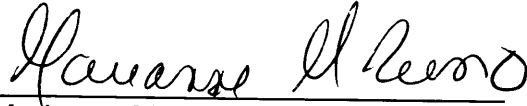
In sum, the Exceptions submitted by Bacquie do not provide a basis for overturning Judge Esposito's Decision. Bacquie's Exceptions are no more than a



challenge to Judge Esposito's determinations as to the credibility of witnesses. As a matter of law, such determinations cannot be overruled by the Board.

Dated: Bronxville, New York  
July 30, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marianne Manning Russo". The signature is fluid and cursive, with the first name "Marianne" being more prominent than the last name "Russo".

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